149 U.S. 296

Office Supreme Court U. S.
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BRIEF OF COUNSEL FOR DEFENDANT IN ERROR.

SUPREME COURT OF THE UNITED STATES.

October Term, 1892. Term No. 166.

H. C. MOSES, M. L. MOSES, ALFRED H. MOSES, O. O. NELSON and J. R. ADAMS, Plaintiffs in Error.

vs.

THE NATIONAL BANK OF LAWRENCE COUNTY.

In Error to the Circuit Court of the United States for the Middle District of Alabama.

Filed ..... *1893.*

S. W. Postell, Law Printer, Atlanta, Ga.

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THE NATIONAL BANK OF LAWRENCE COUNTY.

In Error to the Circuit Court of the United States for the Middle District of Alabama.

BRIEF AND ARGUMENT OF HENRY B. TOMPKINS,
Counsel for Defendant in Error.

FIRST.

It is to be noted that the plaintiffs in error have filed no assignments of error in the transcript of record, and as yet have filed no brief setting forth any such assignments.

SECOND.

The suit brought by The National Bank of Lawrence County, in the circuit court of the United States for the middle

district of Alabama, against M. L. Moses and others, defendants in that court, is after the form of an ordinary common law action in the State of Alabama, and was to collect from defendants the sum of $12,111.51, besides interest, as guarantors upon a paper, as follows:

"$12,111.51. "Sheffield, Ala., Aug. 15th, 1887.

"Four months after date we promise to pay to the order of ourselves twelve thousand, one hundred and eleven 51-100 dollars, at banking house Moses Brothers, Montgomery; value received.

(Signed) "SHEFFIELD FURNACE CO.
"By Alfred H. Moses, V. P."

Endorsed: "Pay to order of J. P. Witherow.

(Signed) "SHEFFIELD FURNACE CO.
"By Alfred H. Moses, V.P."

Endorsed: "JAMES P. WITHEROW."

Endorsed: "We hereby guarantee the payment of this note at maturity. (Signed) "ALFRED H. MOSES,
"M. L. MOSES,
"O. O. NELSON,
"H. C. MOSES,
"J. R. ADAMS,
"S. WOLFF."

Endorsed: "JAMES P. WITHEROW."

The maker of this note, the Sheffield Furnace Company, a corporation with its headquarters at Sheffield, Alabama, in the northern district of Alabama, was not sued; but Alfred H. Moses, who signed the note for said Sheffield Furnace Co., and who also became one of the guarantors, was sued. Against all the guarantors judgment was obtained, excepting S. Wolff, who was not served and had died.

THIRD.

The suit upon the paper above set forth is to be governed

by the general commercial law, irrespective of what may be the statute law or the decisions of the courts in Alabama.

Swift vs. Tyson, 16 Peters, 1;
Oates vs. National Bank, 100 U. S., 239;
Railroad vs. National Bank, 102 U. S., 14;
Pana vs. Bowler, 107 U. S., 529, 541;
Bank of Edgefield vs. Farmers' Co-operative Mfg. Co., 52 Fed. Rep., 98.

In the case of Davis vs. Wells, 104 U. S., at page 169, the Court say: "It has always been held in this court that, notwithstanding the contract of guaranty is the obligation of a surety, it is to be construed as a mercantile instrument in furtherance of its spirit and liberally, to promote the use and convenience of commercial intercourse."

FOURTH.

The Code of Alabama of 1886, section 2675, in respect of pleas of the general issue, is as follows:

"2675 (2988). Pleas general or special.—The defendant may plead more pleas than one; and, if he does not rely solely on a denial of the plaintiff's cause of action, must plead specially the matter of defence. In all actions for defamation, or for injuries to the person, or to real or personal property, the general issue is 'is not guilty', and puts in issue all the material allegations of the complaint; in all other actions the general issue is an averment that the allegations of the complainant are untrue, and, except as may be otherwise provided, puts in issue only the truth of such allegations."

The declaration, or complaint, as it is called under Alabama law, and the amended complaint, are to be found on pages 1, 2, 3 and 4 of printed transcript of record. This complaint and amended complaint, taken together, simply claim from the plaintiffs in error, the defendants below, a certain sum of money by reason of their having guaranteed to James P. Witherow the payment of a certain promissory note assigned to him by the Sheffield Furnace Co., on the 15th August, 1887; which note was given in Alabama, and was made payable at the banking house of Moses Brothers, Montgomery, Alabama.

The plea of general issue was an averment that the allegations of the complaint were untrue, and put in issue only the truth of such allegations. These allegations as set forth in complainant's amended complaint, that these guarantors were bound in law to pay this note at maturity, which has been duly transferred and assigned by Witherow, the defendant in orror, before due.

The facts as to the note, and endorsments thereon: by Sheffield Furnace Co. to Witherow; by Witherow in blank; then the endorsement of guarantee by the plaintiffs in error; and then the endorsement again in blank by Witherow; are all set forth and shown in the bill of exceptions, to be found on pages 12 and 13 of printed transcript of record.

There was no plea of non est factum; and the defendants below, the plaintiffs in error here, offered no evidence to the court.

The numerous pleas, demurrers, etc., shown in the transcript of record, were but encumbrances to the case; and nothing set forth in these pleas were necessary to enable the defendants below to introduce testimony showing that the allegations of the plaintiff were not true.

These special pleas contain nothing of which the defendants could not have availed themselves under the plea of the general issue; and if the court erred in sustaining the demurrers

to any of the special pleas, it was an error without injury, and therefore not constituting a ground of reversal.

See Code of Alabama of 1886, section 2675;
Kannady vs. Lambert, 37 Ala., 57, 59;
Pollak vs. Brush Electric Co., 128 U. S., 446-452.

Under the Alabama cases it would have been error not to have sustained the demurrer to these special pleas.

Cox vs. Columbus, etc., Ry., 91 Ala., 392;
Railway Co. vs. Chambers, 79 Ala., 338.

FIFTH.

The whole question before the court was whether or no the instrument sued upon, taken altogether, constituted a good and binding guarantee in favor of the assignee of Witherow against those signing the guarantee. That these guarantors were bound to pay the money at maturity, see the following authorities:

Richter vs. Frank, 41 Fed. Rep., 859;
Davis vs. Wells, 104 U. S., 159, 166, 169;
Davis Sewing Machine Co. vs. Riches, 115 U. S., 524, 527;
Louisville Co. vs. Welch, 10 Howard, 461, 475;
Wiles vs. Savage, 1 Story, C. C. Rep., 22;
Lawrence vs. McCalmont, 2 How., 426, 452;
Hall vs. Weaver, 34 Fed. Rep., 104, 108,

Langdell's Cases on Contracts, 987;
2. Daniell's Nego. Instruments (4 Ed.), Secs. 1759 (1) et seq.

In the case of Davis & Co. vs. Richards, 115 U. S., 527, the the following is laid down: "A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract."

SIXTH.

Demurrers were filed to 12 of the pleas of the defendants below, except to the 8th plea, which was as follows: "The defendants, for answer to the complainants, saith the Sheffield Furnace Company paid to J. P. Witherow the debt for the recovery of which this suit was brought before this action was commenced." This 8th plea is found in printed transcript of record, page 6.

On page 11 of the printed transcript of record counsel for complainant in the court below join issue upon this 8th plea, by filing a replication as follows: "Comes the plaintiff and for reply to the plea numbered eight filed by defendant, say that it became the owners of the note set out in the complaint for a valuable consideration before its maturity, and no part thereof has ever been paid to this plaintiff, or to any one authorized by it to receive the same."

Counsel for defendants in the court below then file a demurrer to this replication, which is found in printed transcript of record, page 11; and this demurrer to the replication was overruled, and the parties joined issue on the 8th plea. Transcript of record, page 12.

It would seem that this 8th plea should properly have been demurred to along with the others, as it did not allege that Witherow had been paid before the note was transferred to the National Bank, nor that the bank was aware of any such payment.

But at any rate the plea not having been demurred, to the plaintiffs in error, defendants below, could have offered testimony in support of said plea if they had had any to offer.

SEVENTH.

Besides the eighth plea and the plea of the general issue, which, under the code of Alabama is presumed to be filed by appearance of counsel for defendants, there were eleven other pleas, as follows:

Pleas 1, 2, 3 and 4 were filed together, and are found on pages 4 and 5 of printed transcript of record.

1. The first avers that the guaranty does not express any consideration therefor.

2. The second, that the guaranty sued on is a special promise to answer for the debt, default or miscarriage of another, and does not express any consideration therefor.

3. The third sets up that the guaranty sued on is void under the statutory laws of Alabama, because it does not express any consideration therefor.

4. The fourth sets up that the guaranty sued on is a special promise to answer for the debt of another, and does not express any consideration therefor.

It appears that these four pleas when analyzed disclose that

the guaranty does not express consideration; that it is a special promise to answer for the debt, default or miscarriage of another, and is therefore void under the statutory laws of Alabama.

These pleas were demurred to along with the pleas other than the eighth plea, and the demurrer was sustained.

5. The fifth plea, on page 5 of printed transcript of the record, is founded on the statement that the note which was guaranteed was not given upon the consideration paid, or liability incurred, at the time of the making thereof; and the guaranty sued on was made without any consideration.

6. The sixth plea, on pages 5 and 6 of printed transcript of the record, alleges that the instrument sued on was made without any good or valuable consideration.

7. The seventh plea sets up that, at the time the action was commenced, Witherow was indebted to the Sheffield Furnace Co. in the sum of $25,000 on an unliquidated demand, which the defendants offered to set off against the demand of Witherow.

8. The ninth plea again re-iterates that the note described in the complaint was made without any consideration.

9. The tenth plea sets up that the note sued on was given by the Sheffield Furnace Co. for a debt owing to Witherow prior to the making thereof and was not founded upon a consideration paid or liability incurred at the time of the making thereof, and the guaranty sued on was made without any consideration.

10. The eleventh plea sets up that the guaranty sued on was the special promise to answer for the debt of another, and does not express any consideration therefor, and was not executed contemporaneously with the note the payment of which it guarantees.

11. The twelfth plea is in substantially the same language as that of the eleventh.

These two last pleas, in so far as they allege that the plaintiff in its complaint had not stated that the guaranty was executed contemporaneously with the making of the note, are untrue, as the original complaint on page 1, and the amended complaint on 4, of printed transcript of the record do state that fact. The transcript of the record has a typographical error and instead of the word "contemporaneously" has the two words "compare favorably"; but the original transcript of the record, as well as a certified copy of the record in the possession of counsel for the defendant in error, shows this to be an error in the printing.

EIGHTH.

Also the amended complaint, on page 4 of transcript of record, avers:

"The said note mentioned in this court [count] was made and executed on the 15th day of August, 1887, by the Sheffield Furnace Company, then and still a corporation under the laws of Alabama, for twelve thousand one hundred and eleven 51-100 dollars, payable to the order of the said last mentioned corporation four months after the date of said last mentioned note, at banking house of Moses Brothers, Montgomery. The payment at its maturity of the said last mentioned note before its delivery or negotiation, and contemporaneously with its execution and in order to give it credit and currency was guaranteed by said defendants for a valuable consideration by an endorsement in writing on the back of said note, which was made and signed by each and all of said defendants, and which last mentioned guaranty was in the following words: 'We hereby guarantee the payment of this note at maturity,' and was intended by said defendants to induce, and did induce, James P. Witherow and all others to whom said note and guarantee was offered for negotiation or sale, to take said note and guaranty and to give value therefor.

"Plaintiff avers that the said note, with the guaranty thereon, was before its maturity endorsed for value by the said Sheffield Furnace Company to the order of the said Witherow, by the name and description of J. P. Witherow; and plaintiff avers that afterwards, and before the maturity of said note and guaranty thereon, the said Witherow duly endorsed said note, guaranteed as aforesaid, to the plaintiff for value. Plaintiff avers that afterwards, and before the maturity of said note and guaranty, which guaranty was endorsed on said note as aforesaid, the defendants in writing endorsed on said note their waiver of protest and notice in relation thereto, and the said note, guaranteed as aforesaid, was not paid at maturity, and that said note and guaranty, with interest thereon, still remain unpaid and are the property of the plaintiff."

It is further to be noted that the demurrers filed to these various pleas seem all to be predicated upon this point, namely, that until the defendants in the court below should deny the statements made in the amended complaint in respect of the guaranty as set forth on page 4 of printed transcript of the record, there was nothing shown by the pleas which the court orght to permit to stand upon the record.

Further than this, it was not set up by any of the pleas that the National Bank of Lawrence county had not received the note with the guaranty upon it before it was due and for a valuable considerotion; nor did the defendants in their pleas set up anything that they relied upon to defeat the collection of the note, if it had been sued on by Witherow, was known to the National Bank of Lawrence county at the time it purchased the note, before it was due and for a valuable consideration.

The amendment of the plaintiff, as set forth on page 4 of printed transcript of the record, places the National Bank of Lawrence county squarely within all the requirements of the law, as showing that it had a right to recover upon the note as guaranteed by the plaintiffs in error, and nowhere throughout

all the numerous pleas was this simple and straightforward statement so denied as to permit the plea to remain undemurred to. For instance, taking the pleas as stronly in favor of the pleader as possible, and it nowhere appears that anything was alleged which, if proven, would have prevented recovery by the National Bank of Lawrence county against the guarantors.

NINTH.

It is the practice at common law both in the State and federal courts in Alabama for the appearance of counsel for defendant entered upon the docket to be taken as equivalent to the filing of the general issue. So universal is this practice that neither in the rules of court nor in the statutes is there any provision to the contrary; and in the Code of Alabama of 1886, wherein forms for complaints and pleas in actions at common law are set out, it was not thought necessary to provide a form for the plea of the general issue. See Code of Alabama of 1886, page 796.

It is further the practice in the common law courts in Alabama, both State and federal, that where no counsel's name is entered for the defendant by the second day of the term, that complainant may take what is known as judgment *nil dicet*, and afterwards may have a writ of inquiry before the court or jury upon the question of damages.

HENRY B. TOMPKINS,
for Defendant in Error.

Atlanta, Ga., 21st March, 1893.

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H. C. MOSES, M. L. MOSES, ALFRED H. MOSES, O. O. NELSON, AND J. R. ADAMS,

Plaintiffs in Error.

versus

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Supplemental Brief and Argument for Plaintiffs in Error.

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STATEMENT OF CASE.

This is a suit by the defendant in error on a guaranty endorsed on a promissory note in these words; "We hereby guarantee the payment of this note at maturity," signed by plaintiffs in error. There are two counts in the declaration (Record 1 and 3), but there is no substantial difference in them, so far as the point of this argument is concerned. Each count states that the guaranty was made "for a valuable consideration," but neither states what the consideration was, nor that it was one moving to the defendant, nor that the writing expresses it.

The defendant pleaded the statute of frauds, averring that the guaranty was a special promise to answer for the debt, default or miscarriage of another, and did not express the consideration. See. Pleas 2, 3, 4, Record p. 5, and Pleas 11 and 12, Record 7–8.

The defendant also pleaded that "the guaranty sued on was made without any consideration."
See. Plea 5, Record p. 5.

The defendant also pleaded "that the instrument sued upon was made without any good or valuable consideration."
See. Plea 6, Record p. 5–6.

The plaintiff demurred to these pleas.
Record p. 9.

And the demurrer to each was sustained.
Record p. 12.

ERRORS ASSIGNED.

1. The court erred in sustaining the demurrers to pleas number 2, 3, 4, 11 and 12, setting up the statute of frauds.

2. The court erred in sustaining the demurrer to plea number 5.

3. The court erred in sustaining the demurrer to plea number 6.

ARGUMENT.

1. The guaranty sued on is directly within the statute of frauds of Alabama. Rigby v. Norwood, 34 Ala. 129. The only point against the sufficiency of the pleas setting up the statute is that they do not exclude the conclusion that the guaranty was made upon a consideration beneficial to the guarantors. It being the law of Alabama, by judicial construction, that contracts of this kind when based on a consideration beneficial to the promissor, as contradistinguished from considerations of benefit to a third person at the request of the promissor or of detriment to the promissee, are not within the statute.

Martin v. Black, 21 Ala. 721.
Thornton v. Williams, 71 Ala. 555.
Mason v. Hall, 30 Ala. 599.

But the rules of pleading do not require the plea ler to notice and remove in his declaration or plea every possible exception, answer or objection, which may exist, and with which the adversary may intend to oppose. It is sufficient if the pleading establishes a *prima facie* case. If the law raise an exception to the general right, it need not be stated in pleading.

1. Chitty on Plead. mar. p. 222 *et seq.*

If this was not so, there would be no such thing as pleading by way of confession and avoidance. The only answer to a declaration would be a traverse.

It is clear then that the pleas of the statute of frauds in this case were good, as they set up a general statute having no exception in its enacting clause. A *prima facie* defense was made out by these pleas, and it rested with the plaintiff in the replication to set up the special exception if any raised by law against the general right.

1 Chitty *supra*

The statute of limitations usually contains exceptions, and in pleading the statute the defendant is not required to negative the exceptions. It is incumbent on the plaintiff at law and in equity to bring his case within the exceptions.

2 Saunders on Plead. and Ev. 307–8.

Piatt v. Vattier, 9 Pet. p. 416.

Miller v. M'Intyre, 6 Pet. 61.

Taylor v. Benham, 5 How. p. 262–3.

And, on the same principle, to a plea of the statute of frauds, in answer to a bill for specific performance, the plaintiff must allege or reply, and not the defendant anticipate by denial, the matters of part performance taking the case out of the statute.

Brown on Stat. of Frauds, §518.

Whitchurch v. Bevis, 2 Bro. C. C. 559.

The declaration in this case does not allege that the guaranty was on such a consideration as would take the case out of the statute.

The declaration merely avers a valuable consideration; which might be one of benefit to a third party at the request of the promissor or one of detriment to the promisee. It therefore, contained no answer, by anticipation, to the plea of the statute of frauds. And the demurrer to the pleas of the statute should therefore have been overruled.

It is a necessary feature of every contract that it must be supported by a valuable consideration. There is nothing peculiar about the contract of guaranty in this respect. But the statute of frauds, quoted in the brief on file, expressly provides that contracts of this kind are void, "unless such agreement, or some note or memorandum thereof, expressing

that the guaranty expresses no consideration, the declaration is certainly answered, and the demurrers to the pleas should have been overruled. If the note is part of the guaranty, the averment that the guaranty expresses no consideration is an averment that the whole writing constituting the guaranty, is deficient in this respect.

II. The demurrers to the pleas numbered 5 and 6, denying that there was any consideration for the guaranty sued on, should also have been overruled. Every contract must be supported by a valuable consideration, and we do not see what objection can be made to these pleas. The point seems too plain for argument.

The guaranty, though negotiable, so far as to be assignable, is not commercial paper so far as to pass free from equities. (Neal v. Smith 5 Ala. 568); and therefore there was an undoubted right in the guarantors to show that this contract lacked not only the legal essentials of form, in not having the consideration expressed, but the substantial ingredient of every contract, a consideration to uphold it.

But the action of the court upon the demurrers to the pleas shut off every point of defense—holding that pleas were bad which did not answer allegations not found in the declaration, and that a contract passing subject to equities could not be shown to be without consideration when the law required the consideration to be expressed in the contract.

J. M. & W. Clute
W. A. Gunter
Counsel for Appellants.

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Supplemental Argument and Brief of Counsel for Defendant in Error.

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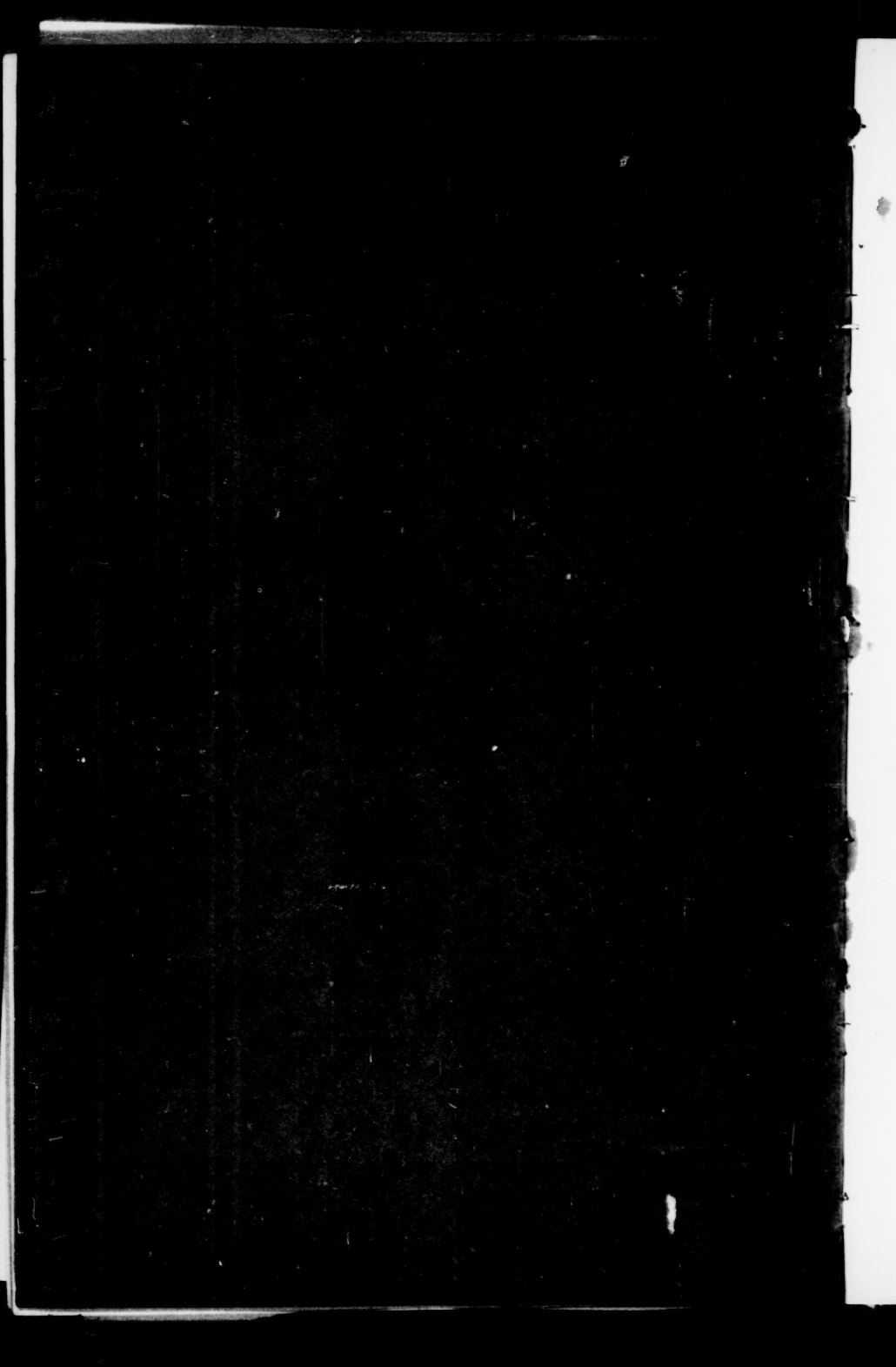

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SUPPLEMENTAL BRIEF AND ARGUMENT

For Defendant in Error, in reply to Brief and Supplemental Brief of Plaintiffs in Error.

FIRST.

In view of the commercial law applicable to negotiable instruments as administered in courts of the United States, it appears that the only plea other than the general issue that could have been properly made by the plaintiffs in error to the guaranty upon this note should have been framed substantially as follows: "That the guaranty sued on was a

special promise to answer for the debt, default or miscarriage of another, and was not executed contemporaneously with the note or prior to its negotiation by Witherow to the National Bank of Lawrence County, and the said guaranty was not made or intended by the guarantors to induce, nor did the same induce, the said Witherow or the said National Bank to take said note and guaranty and give value therefor."

While under the code of Alabama it is stated that the promise in writing to answer for the debt, default, etc., of another must set forth that it is made upon a consideration yet this rule does not obtain in the courts of the United States, nor was the consideration necessary to be recited in writing under the statute of frauds enacted in the 29th Charles II (1667). The section of the statute of frauds of Charles II relating to the question under discussion was as follows: "No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

SECOND.

The only pleas made by the defendants in the court below, other than the general issue, which have even the semblance of being properly filed were the 11th and 12th pleas, and the 11th is not necessary to be considered, as the 12th contains the same matter and is more extended than the 11th. This 12th plea states: "That the guaranty sued on is a special promise to answer for the debt of another and does not express any consideration therefor, and was not executed contemporaneously with the note nor prior to its negotiation,

the payment of which it guaranteed of said note." Now if it is not necessary in a written guaranty to set forth the consideration to comply with the law as administered in federal courts, the only part of this plea that could be considered is that wherein it states that the guaranty was not executed contemporaneously with the note nor prior to its negotiation. The meaning of this is prior to its negotiation by the Sheffield Furnace Co. to Witherow, and there is no denial in any of the pleas that the National Bank received the note in the due course of trade, for a valuable consideration, with the guaranty upon it and before the note was due. The question recurs, then, was it not absolutely necessary, in order that the plea should not be demurrable, that it should be substantially in form as hereinbefore stated; and that not only the plea should put in issue the statement in the complaint that the guaranty was made contemporaneously with the note and prior to its negotiation by Witherow to the Bank, but also that the plea should put in issue the allegation in the declaration that the guaranty was intended by the plaintiffs in error to induce, and did induce, Witherow and others, to whom said note and guaranty were offered for negotiation and sale, to take said note and guaranty and give value therefor.

The form of the guaranty is to be noted: "We hereby guarantee the payment of this note at maturity;" not that the payment of the note is guaranteed provided the maker fails to pay it, as is the usual form. And it is contended by counsel for the defendant in error that this guaranty of payment at maturity in all events was equivalent to an endorsement, and the note as well as the guaranty being negotiated before the note became due, that the defendant in error under the commercial law as administered in the federal courts has the same right of recovery against the guarantors as if it had been a regular endorsement of the note by the

guarantors as endorsees. The law appears to be well settled, that a party signing on the back of a note as guarantor may make an absolute negotiable promise to pay it as well as if it was signed on its face. "Where C and D indorsed on the back of a note from A to B at the same time it was made: 'For value received, we jointly and severally undertake to pay the money within mentioned to the said B' (the payee), they were held as original promisors."

2d Daniel Negotiable Instruments (4th ed.), sec. 1780, and authorities there cited.

No one of the pleas demurred to denied that the note and guaranty were not before maturity and for value duly endorsed to Witherow by the Furnace Co., and then before maturity and for value duly endorsed to the National Bank of Lawrence Co.

THIRD.

Suppose it be admitted as true that this particular guaranty was endorsed upon the note given for a passed due consideration; was not endorsed contemporaneously with the making of the note, and the negotiation by endorsement of the Sheffield Furnace Co. to Witherow; but that the guaranty was made a week or a month after the making of the note and the endorsement to Witherow and possession of it by him. That then Witherow, before the note was due, in the due course of trade and for a valuable consideration, sold and endorsed the note and guaranty to the National Bank; and this is nowhere brought in question. Still it is contended for defendant in error that such acquisition of the note and the guaranty gave full title to both, and that the pleas as shown in the transcript of the record were demurrable. It is to be further observed in this connection, that the guarantors themselves treated the guaranty as an endorsement, because

they waived notice and protest in writing upon the note. See Transcript of Record, pages 1 and 4, where it appears that upon the note the defendants below endorsed a waiver of protest and notice.

FOURTH.

There is doubtless a conflict of authority as to whether or not a guaranty endorsed upon a promissory note in form of the one now under consideration passes by assignment of the original obligation and is negotiable under commercial law. The weight as well as the importance of the authorities is in favor of the negotiability of such guaranty.

See Brandt on Suretyship and Guaranty, sec. 33;
2d Daniel on Negotiable Inst. (4th ed.), sec. 1777 to 1781;
Story on Bills, sec. 458.

This view is not concurred in by Mr. Parsons, as shown in 2 Parsons on Notes and Bills, p. 133, 134; but the author of Daniel on Negotiable Instruments dissents from Mr. Parsons and concurs with the doctrine announced by Judge Story, and as set forth by Chancellor Walworth in McLaren vs. Watson's Ex'rs, 26 Wend., 430. See, also,

White vs. Howland, 9 Mass., 314;
Coleman vs. Fuller, 105, N. C., 328;
[Lawyers' Reports, Annotated, Book 8, p. 380;]
Partridge vs. Davis, 20 Vt., 499;
Killian vs. Ashley, 24 Ark., 511;
Studebaker vs. Cody, 54 Ind., 586;
Ketchell vs. Burns, 24 Wend., 456;
Jones vs. Berryhill, 25 Ia., 289;

Nevins vs. Bank of Lansingburg, 10 Mich., 547;
Everson vs. Gore, 40 Hun. (N.Y.) 248;
Toppan vs. Cleveland, etc., R. R., 1 Flip. (U.S.) 74;
Hill vs. Smith, 21 How., 283.

In this last case the following language is used: "As the contract is in writing, signed by the parties to be charged, it cannot be affected by the statute of frauds; and, although the term 'guaranty' is usually applied to a collateral undertaking to pay the debt of another, yet when taken in connection with the other terms of the instrument, this is clearly an original, independent contract."

FIFTH.

But without reference to the foregoing, it is contended by counsel for defendant in error that the action of the court in sustaining the demurrers to the pleas was right for another and independent reason.

The plea of the general issue, as shown in the original brief, was, under the laws of Alabama, filed in this cause; and by the law of Alabama, as well as by the common law, all the defences set up by the plaintiffs in error in their special pleas they could have availed themselves of under plea of the general issue, except possibly the plea of payment set forth in the 8th plea and the demurrer to which was not sustained.

In Alabama the plea of general issue is a mere general denial of the allegations of the complaint without offering any special matter of defence. It casts on the plaintiffs the onus of proving every material allegation of the complaint, and limits the defence to evidence in disproof of such material allegations.

Petty vs. Dill, 53 Ala., 641, 645.

Now, under the ruling of the Supreme Court of the United States in Davis vs. Wells, 104 U. S., p. 169, the contract of guaranty being construed as a mercantile instrument the introduction of the note with this guaranty upon it was prima facie proof of the allegations in the complaint of the defendant in error in respect of this guaranty, and casts upon the plaintiffs in error the burden of disproving these allegations. This disproof, namely, that the guaranty was not made contemporaneously with the note and before its negotiation, and was not made to induce Witherow and others, and did not induce Witherow and others, to take the note of the Sheffield Furnace Company, were all matters that could have been disproved under the plea of the general issue, and, therefore, as stated in the original brief of counsel for defendant in error, there was no injury done to the plaintiffs in error in sustaining the demurrers to their pleas.

SIXTH.

Replying specially to the supplemental brief and argument for plaintiffs in error filed by J. M. White and W. A. Gunter, Esquires, counsel for defendant in error insists:

1. That the question of contract arising under guaranty is in the said brief of counsel for plaintiffs in error treated entirely from the standpoint of Alabama statutes and decisions.

2. In such brief it is assumed that the consideration in a contract of guaranty must be stated as required by the code of Alabama, when such is not required by the law relating to this subject as administered in federal courts.

3. In such brief it is assumed that the contract of guaranty in no event comes within the rules of law as administered by the federal courts making such contract a commercial paper to be governed by the commercial law.

4. In such brief it is assumed, further, that no defence could be shown against the suit on the contract of guaranty under the plea of general issue, but that such defence could be set up only by special pleas.

Each of these points are controverted in the foregoing part of this brief; and it is now insisted by counsel for defendant in error that each of these points are badly taken by counsel for plaintiffs in error.

See original brief of defendant in error, and authorities first cited on page 5.

"A defendant may insist upon the benefit of the statute (of frauds) by plea of the general issue, or in equity by answer simply denying the fact of the agreement which the plaintiff charges to have been made."

Browne on the Statute of Frauds, sec. 511;
1 Sugden on Vendors, American notes by J. C. Perkins, bottom page 150, note 0;
79 Cal., 525, Feeney vs. Howard;
101 U. S., 231, 237, May vs. Sloan;
46 Fed. Rep., 836, 837, McDonald vs. Youngbluth;
116 U. S., 491, 495, Dunphy vs. Ryan.

This last case of Dunphy vs. Ryan was an action to recover on promissory notes, and the defence was that the notes were given for land under a contract which was void under the statute of frauds. The court says: "The denial in the replication of the plaintiff of the making of the contract on which defendant bases his cross-action is as effective for

letting in the defence of the statute of frauds as if the statute had been specifically pleaded."

"In all actions upon contracts, the general issue is an averment that the allegations in the complaint are untrue."

Code of Ala., 1886, sec. 2675, as fully stated in original brief for defendant in error, page 3.

In neither of the original or supplemental briefs filed by the four counnsel for plaintiffs in error is it attempted to be shown that by the statutes and decisions of the State of Alabama each and every allegation of the original and amended complaint of the National Bank of Lawrence County could not have been disproved at the trial by evidence introduced under the plea of general issue. And surely in the multitude of research made by these four gentlemen, as embodied in the original and supplemental briefs, some statement or citation would have been made showing that such evidence could not have been introduced under the plea of general issue, if it had been possible to adduce authority on this point.

In the well considered case of Feeney v. Howard, 79 Cal., the court shows that it is the prevailing rule, not only in most of the State courts, but in the Supreme Court of the United States, to take advantage of the statute of frauds under plea of general issue at law and under answer in equity.

The original brief of counsel for defendent in error was filed in this court some days before the original and supplemental briefs of counsel for plaintiffs in error were prepared. In neither of these briefs for plaintiffs in error was the position taken by counsel for the Bank of Lawrence County in its brief, on page 11, under head ninth, noticed or controverted.

At the trial in the court below the design and effort of counsel for plaintiffs in error appears to have been to confuse the case, if not the court, by a multitude of special plead-

ings. Yet at last no attempt was made to disprove any fact set up by the complaints of defendants in error, as manifestly could have been done under the plea of general issue; nor to establish the truth of payment, as averred by the 8th plea of plaintiff in error.

The record presents a case managed at the trial for the purpose of mystification, and brought to this court solely for the purpose of delay.

HENRY B. TOMPKINS,
For Defendant in Error.

Atlanta, Ga., 18 April, 1893.

nace Company, which is set out in the complaint, upon which endorsement the defendants are sought to be held liable, was made by defendants contemporaneously with the execution of said note and before the same was negotiated and before the same became
14 an obligation, and for the purpose of having the same negotiated.

Sixth. It is shown by the allegations of the complaint and not denied by the pleas that the said alleged guaranty was endorsed upon the note and signed by the defendant- contemporaneously with the execution of said note & prior to its negotiations.

Seventh. It is shown by the allegations of the complaint & not denied by the pleas that the said alleged guaranty was executed contemporaneously with the execution of said note set out in said complaint & prior to its negotiation and was a part of said note at the time of its negotiation.

Wherefore plaintiffs pray judgment of said pleas, and whether it shall be required further to reply to the same.

RICE & WILEY,
H. C. TOMPKINS,
Att'ys for Plaintiff.

Filed December 1st, 1888.

J. W. DIMMICK, *Clerk.*

Demurrer to Def'ts' Pleas.

In the Circuit Court of the United States for the Middle District of Alabama.

NATIONAL BANK OF LAWRENCE COUNTY
vs.
M. L. MOSES *et al.* } 662.

Now comes the plaintiff in the above-stated cause and demurs to each of the pleas filed herein except the plea numbered eight, and as grounds of demurrer assign- to each plea separately the following:
15 First. That said plea is insufficient in this, that it alleges conclusions of the pleader, and not any facts upon which plaintiff can take issue.

Second. That said plea does not show that said note and guaranty were not founded upon a valuable consideration, moving to said guarantors prior to the execution of the same.

Third. Said plea is filed as an answer to the entire complaint filed herein, and allege- no matters or things traversing or avoiding the material allegations of the second or amended count of said complaint.

Fourth. It is not denied by said plea that said guaranty was made upon said note prior to its negotiation to this plaintiff, and to induce this plaintiff or some one else to purchase or discount the same.

Fifth. It is not denied by said plea that defendants did make and

endorse said guaranty upon said note to give it credit and currency, and that it was so endorsed prior to its negotiation to plaintiff.

Sixth. That it is alleged in said complaint and not denied in said plea that plaintiff purchased said note and guaranty for value before the maturity of the same.

Seventh. That it is alleged in said complaint and not denied in said plea that said defendants endorsed said guaranty upon said note to give it credit and currency prior to its negotiation to
16 plaintiff, and said plea does not aver or show that plaintiff had any notice of any want or consideration for such guaranty.

Eighth. Said guaranty endorsed upon said note imparts a consideration, and it is not denied that the same was endorsed thereon prior to the negotiation of the same to plaintiff, nor is it averred that plaintiff had any notice of said alleged want of consideration for said guaranty.

Ninth. It is averred in said complaint, and not denied in said plea, that defendants endorsed said guaranty upon said note prior to its negotiation to plaintiff to give it credit and currency, and that plaintiff purchased the same for value before maturity, and it is not averred in said plea that plaintiff had any notice of the several matters & things set forth therein.

Tenth. Each plea professes to be an answer to the whole complaint, but it is not an answer or bar to the whole complaint.

Eleventh. Said plea is not verified by any oath or affidavit.

And to each of said pleas, except the two numbered eleven and twelve, respectively, said plaintiff assigns to each separately the following additional grounds of demurrer:

First. That it is not denied in said plea that defendants endorsed said guaranty upon said note contemporaneously with its execution and prior to any negotiation thereof.

Second. That it is not denied in said plea that defend-
17 ants endorsed said guaranty upon said note contemporaneously with the execution of the same to give credit and currency to the same and to induce those to whom the same was offered for negotiation or sale to purchase the same and give value therefor.

Wherefore *defendant* prays judgment upon said several pleas separately and whether it shall be further required to reply to the same.

RICE & WILEY,
H. C. TOMPKINS,
Att'ys for Def't.

Filed in open court December 1st, 1888.
J. W. DIMMICK, *Clerk.*

Replication to Plea No. 8.

In the Circuit Court of the United States for the Middle District of Alabama.

THE NATIONAL BANK OF LAWRENCE COUNTY
vs.
M. L. MOSES *et al.* } 662.

Comes the plaintiff & for reply to the plea numbered eight filed by defendant- say that it became the owners of the note set out in the complaint for a valuable consideration before its maturity, and no part thereof has ever been paid to this plaintiff or to any one authorized by it to receive the same.

RICE & WILEY,
H. C. TOMPKINS,
Att'ys for Plaintiff.

Filed December 1st, 1888.

J. W. DIMMICK, *Clerk.*

18 *Demurrer to Replication.*

In the Circuit Court of the United States for the Middle District of Alabama.

THE NATIONAL BANK OF LAWRENCE COUNTY
vs.
M. L. MOSES *et al.* } 662.

Now comes the defendants and demur to the replication of the plaintiff to plea number 8 on the following grounds:

1st. That said replication does not aver that the plaintiff did not know at the time it became the owner of the note set out in the complaint that the Sheffield Furnace Company had paid to J. P. Witherow the debt for the recovery of which this suit was brought.

2d. That said replication does not deny knowledge on the part of the plaintiff at the time plaintiff became the owner of the note mentioned and described in the complaint that the Sheffield Furnace Company had paid to J. P. Witherow the debt for the recovery of which this suit was brought.

ARRINGTON & GRAHAM,
Att'ys for Defendants.

Filed in open court December 1st, 1888.

J. W. DIMMICK, *Clerk.*

Judgment Entry, Dec. 1, '88.

THE NATIONAL BANK OF LAWRENCE COUNTY
vs.
M. L. MOSES *et al.* } 662.

This day came the parties, by their attorneys, and by leave of the court the plaintiff makes and files an amendment to the complaint

which amendment the court authorized to be made and filed.
19 The death of the defendant Wolffe was suggested and admitted, he having died since the commencement of this suit and without being served. The court then considered and overruled the demurrer of the defendants to the complaint. The defendants then, by leave of the court first had and obtained, file-twelve pleas in answer to the complaint of plaintiff, to each of which, except the 8th plea, the plaintiff demurred on the grounds set out in its demurrers on file and filed a special replication to the 8th plea. The court sustained the demurrers of plaintiff to the pleas. The defendants demurred to said *to said* replication to said 8th plea on the grounds set out in their demurrer on file, which demurrer to said replication the court overruled, and the parties join issue on said 8th plea and replication. Thereupon came a jury of twelve good and lawful men, to wit, E. Seibels and eleven others, who, being duly elected, tried, and sworn well and truly to try this issue joined between the parties and a true verdict render according to the evidence, upon their oaths do say: We, the jury, find for the plaintiff and assess the damages at $13,034.68. It is therefore considered by the court that said plaintiff recover of said defendants the said sum of $13,034.68 so assessed by the jury aforesaid, and also the costs in this behalf expended, for which execution may issue.

20 *Bill of Exceptions.*

In the Circuit Court of the United States for the Middle District of Alabama, November Term, 1888.

THE NATIONAL BANK OF LAWRENCE COUNTY
vs.
M. L. MOSES *et al.* } 662.

Be it remembered that on this first day of December, 1888, and a day of said November term, 1888, of said circuit court a jury was empannelled and sworn well and truly to try the issue joined between the parties, and on the trial by the jury the plaintiff offered to introduce and read in evidence to the jury a promis-ory note, which is in words and figures as follows:

$12,111.51. SHEFFIELD, ALA., *Aug. 15th*, 1887.

Four months after date we promise to pay to the order of ourselves twelve thousand one hundred eleven $\frac{51}{100}$ dollars, at banking-house — Moses Brothers, Montgomery, value received.

SHEFFIELD FURNACE CO.,
By ALFRED H. MOSES, *V. P.*

The defendants in the presence of the jury duly objected to the introduction of said promis-ory note as thus offered as evidence for the plaintiff before the jury. The court overruled the objection of the defendants to the introduction of said promissory note as offered

as aforesaid to be read in evidence to the jury by the plaintiff as evidence for the plaintiff; and thereupon the plaintiff did read in evidence to the jury the said promissory note, and to this ruling of the court as to the reading of said promissory note to the jury
21 as evidence for the plaintiff the defendants duly excepted in the presence and hearing of the jury and before they retired to make up their verdict, and this exception was noted and allowed by the court at the time it was taken.

The plaintiff then offered to introduce and read in evidence to the jury an endorsement on said promissory note; which endorsement is in words and figures as follows:

Pay to the order of J. P. Witherow.
SHEFFIELD FURNACE CO.,
By ALFRED H. MOSES.

The plaintiff also offered to introduce and read in evidence a blank endorsement on said note made by J. P. Witherow on the back of said note and immediately following said endorsement. The defendants in the presence of the jury duly objected to the introduction of said blank endorsement of said J. P. Witherow as thus offered as evidence for the plaintiff to the jury. The court overruled this objection of the defendants to the introduction of said blank endorsement as aforesaid to be read in evidence to the jury by the plaintiff as evidence for the plaintiff, and thereupon the plaintiff did read in evidence to the jury this said blank endorsement, and to this ruling of the court as to the reading of this said blank endorsement as evidence for the plaintiff, the defendants duly excepted in the presence and hearing of the jury, and before they retired to make up their verdict, and this exception was noted and allowed at the time it was taken.

22 The plaintiff then offered to introduce and read in evidence to the jury another endorsement on said promissory note; which endorsement is in words and figures as follows:

"We hereby guarantee the payment of this note at maturity.
"(Signed) ALFRED H. MOSES.
"M. L. MOSES.
"O. O. NELSON.
"H. C. MOSES.
"J. R. ADAMS.
"S. WOLFF."

The defendants in the presence of the jury duly objected to the introduction of said last endorsement on said promissory note as thus offered as evidence for the plaintiff. The court overruled this objection of the defendants to the introduction of the said last endorsement as evidence and allowed said endorsement as offered as evidence as aforesaid to be read in evidence to the jury by the plaintiff, and to the foregoing ruling of the court as to the reading said last endorsement before the jury as evidence by the plaintiff the defendants duly excepted in the presence and hearing of the jury and be-

fore they retired to make up their verdict, and this exception was noted and allowed by the court at the time it was taken.

The plaintiff then offered to introduce and read in evidence a blank endorsement on said note made by said J. P. Witherow below said guaranty on the back of said note.

The defendant- in the presence of the jury duly objected to the introduction of said blank endorsement by said Witherow
23 as thus offered as evidence for the plaintiff to the jury. The court overruled this objection of the defendants to the introduction of said blank endorsement as aforesaid to be read in evidence to the jury by the plaintiff as evidence for the plaintiff, and thereupon the plaintiff did read in evidence to the jury the said blank endorsement, and to this ruling of the court as to the reading of said blank endorsement as evidence for the plaintiff the defendants duly excepted in the presence and hearing of the jury and before they retired to make up their verdict, and this exception was noted and allowed by the court at the time it was taken.

The foregoing was all the evidence introduced before the jury on the trial of this case.

Thereupon the court charged the jury to find a verdict for the plaintiff for the amount sued for, with interest thereon. To the giving of this charge the defendant- duly excepted before the jury retired to make up their verdict and in the presence and hearing of the jury, and this exception was noted and allowed by the court at the time it was taken.

And the defendants tender this their bill of exception, which is signed, sealed, and allowed as such by the presiding judge in open court and during said November term, 1888, of said circuit court of the United States and on this the first day of December, 1888.

JOHN BRUCE, *Judge.*

We agree that the within bill of exceptions is correct & conse-t that the same may — signed.

RICE & WILEY, TONPKINS,
Att'ys for Plaintiff.

Filed the 18th day of Jan., 1889.

J. W. DIMMICK, *Clerk.*

24 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the middle district of Alabama, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between The National Bank of Lawrence County, a corporation created and existing under the laws of the United States and a citizen of the State of Pennsylvania, plaintiff, and H. C. Moses, M. L. Moses, Alfred H. Moses, O. O. Nelson, and

J. R. Adams, defendants, who are citizens of the State of Alabama, a manifest error hath happened, to the great damage of the said H. C. Moses, M. L. Moses, Alfred H. Moses, O. O. Nelson, and J. R. Adams, defendants as aforesaid, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with *with* all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid be- inspected, the
25 said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice
[SEAL.] of the said Supreme Court, the 18th day of January, in the year of our Lord one thousand eight hundred and eighty-nine.

J. W. DIMMICK,
Clerk of the Circuit Court of the United States,
Mid. Dist. of Ala.

Appeal Bond.

Know all men by these presents that we, M. L. Moses, O. O. Nelson, H. C. Moses, J. R. Adams, Alfred H. Moses, J. T. Moses, Ignatious Pollak, are held and firmly bound unto The National Bank of Lawrence County, which is a corporation existing under the laws of the United States and a citizen of the State of Pennsylvania, in the full and just sum of twenty-six thousand and seventy dollars, to be paid to the said The National Bank of Lawrence County or its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of December, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately, at the present term of the circuit court of
26 the United States for the middle district of Alabama, in a suit pending in said court between the said The National Bank of Lawrence County, plaintiff, and M. L. Moses, O. O. Nelson, H. C. Moses, J. R. Adams, and Alfred H. Moses, defendants, a judgment was rendered against the said M. L. Moses, O. O. Nelson, H. C. Moses, J. R. Adams, and Alfred H. Moses in the sum of thirteen thousand thirty-four & $\frac{67}{100}$ dollars, and the said M. L. Moses, O. O. Nelson, H. C. Moses, J. R. Adams, and Alfred H. Moses having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The National Bank of Lawrence County, citing and ad-

monishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the conditions of the above obligation is such that if the said M. L. Moses, O. O. Nelson, H. C. Moses, J. R. Adams, and Alfred H. Moses shall prosecute said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

M. L. MOSES.	[SEAL.]
O. O. NELSON.	[SEAL.]
H. C. MOSES.	[SEAL.]
J. R. ADAMS.	[SEAL.]
ALF. H. MOSES.	[SEAL.]
I. T. MOSES.	[SEAL.]
IGNATIUS POLLAK.	[SEAL.]

Approved by—
JOHN BRUCE, *Judge.*

27 *Citation.*

THE UNITED STATES OF AMERICA:

To The National Bank of Lawrence County, which is a corporation duly organized and existing under the laws of the United States and is a national banking corporation, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the middle district of Alabama, wherein M. L. Moses, O. O. Nelson, H. C. Moses, J. R. Adams, and Alfred H. Moses are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Don A. Pardee, judge of the circuit court of the United States, this 17th day of September, in the year of our Lord one thousand eight hundred and eighty-nine.

DON A. PARDEE,
Circuit Judge.

Received in office this 17th day of Sept., 1889.
W. W. ALLEN, *U. S. M.*

28 On this 18th day of September, in the year of our Lord one thousand eight hundred and eighty-nine, personally appeared J. A. Whiting, deputy United States marshal for middle district of Alabama, before me, the undersigned authority, and makes oath that he delivered a true copy of the within citation to A. A. Wiley, of the firm of Rice & Wiley, attorneys of record for the National Bank of Lawrence county, which is a corporation duly

organized and existing under the laws of the United States and is a national banking corporation, on this the 18th day of September, 1889, in the city of Montgomery, Alabama.

J. A. WHITING,
Dep'ty U. S. M.

Sworn to and subscribed the 18th day of September, A. D. 1889.

BENJ. P. SEALS,
Dep. Clerk U. S. Cir. Court, Mid. Dist. of Alabama, & U. S. Commissioner for said Dist.

Returned and filed the 18th day of Sept., 1889.

J. W. DIMMICK, *Clerk, &c.*

29 UNITED STATES OF AMERICA, } *ss:*
Middle District of Alabama, }

I, J. W. Dimmick, clerk of the circuit court of the United States for the said middle district of Alabama, hereby certify that the foregoing pages, numbered from one to 28, inclusive, contain a full, true, and complete transcript of the record and proceedings had in a case lately depending in said court, wherein The National Bank of Lawrence County was plaintiff and M. L. Moses and others defendants, as fully and completely as the same appear of record and on file in my office as such clerk.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be affixed, at Montgomery, in said district, this 25th day of Sept., 1889.

{ Seal of the United States Circuit Court, Middle District of Alabama. }

J. W. DIMMICK,
Clerk U. S. Dist. *Court, Mid. Dist. of Ala.*

Endorsed on cover: Case No. 13,751. M. Alabama C. C. U. S. No. 166. H. C. Moses, M. L. Moses, Alfred H. Moses, O. O. Nelson, and J. R. Adams, plaintiffs in error, *vs.* The National Bank of Lawrence County. Filed October 12, 1889.

149 U.S. 298

Office Supreme Court U. S.
FILED.
APR 3 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1892.

TERM No. 166. CASE No. 13,751.

H. C. MOSES, M. L. MOSES, ALFRED H. MOSES, AND J. R. ADAMS,
Plaintiffs in Error,

vs.

THE NATIONAL BANK OF LAWRENCE COUNTY.

Brief and Argument of Plaintiffs in Error.

Supreme Court of the United States.

OCTOBER TERM, 1892.

TERM No. 166. CASE No. 13,751.

H. C. MOSES, M. L. MOSES, AIFRED H. MOSES, AND J. R. ADAMS,
Plaintiffs in Error,

vs.

THE NATIONAL BANK OF LAWRENCE COUNTY.

Brief and Argument of Plaintiffs in Error.

STATEMENT OF THE CASE.

The Sheffield Furnace Company, a corporation under the laws of Alabama, executed its promissory note on the 15th day of August, 1887, payable at four months after date to its own order, at the Banking House of Moses Brothers, Montgomery, Alabama, for the sum of $12,111.51. The defendants (the plaintiffs in error) executed a guaranty for the payment of said note in the following words: "We hereby guarantee the payment of this note at maturity." This guaranty was, according to the averments of the complaint, executed contemporaneously with the note, or before its negotiation, but, this is denied by some of the pleas of the defendants. The note was endorsed before maturity to the order of J. P. Witherow, and by him endorsed in blank. The plaintiffs in error (the defendants below) were sued on their liability on said note after default of payment by the maker thereof.

The only question arising in the case, is as to the sufficiency of the defendants' pleas. There is no contention as

to the facts, except as raised by the pleadings. The court sustained demurrers to all of the pleas, except one, which it is now immaterial to consider. Judgment was rendered for the plaintiff below on issue joined on the one plea, viz: payment.

ERRORS ASSIGNED.

1. The Court erred in sustaining the demurrer to plea No. 1. (See Record, p. 4, for plea; p. 9 for demurrer.)
2. The Court erred in sustaining demurrer to plea No. 2. (See Record, p. 4, for plea; p. 9 for demurrer.)
3. The Court erred in sustaining demurrer to plea No. 3. (pp. 4 & 9 of Record.)
4. The Court erred in sustaining demurrer to plea No. 4. (pp. 4 & 9 of Record.)
5. The Court erred in sustaining demurrer to plea No. 5. (pp. 5 & 9.)
6. The Court erred in sustaining demurrer to plea No. 6. (pp. 5 & 9.)
7. The Court erred in sustaining demurrer to plea No. 7. (pp. 6 & 9.)
8. The Court erred in sustaining demurrer to plea No. 9. (Record, pp. 7 & 9.)
9. The Court erred in sustaining demurrer to plea No. 10. (Record, pp. 7 & 9.)
10. The Court erred in sustaining demurrer to plea No. 11. (Record, pp. 7 & 9.)
11. The Court erred in sustaining demurrer to plea No. 12. (Record, pp. 8 & 9)

ARGUMENT.

The action was brought against the guarantors of a commercial promissory note, and is based on the guaranty. The Complaint (R. p. 1 to 4) contains (after amendment) two counts.

According to the first count of the complaint, on the 15th day of August, 1887, the Sheffield Furnace Company executed its negotiable promissory note for $12,111.51, at four

months, payable to its own order: —— that contemporaneously with the execution of the note, the defendants, for a valuable consideration, endorsed their absolute and unconditional guaranty thereon for its payment at maturity. That said note was, before its maturity, endorsed to J. P. Witherow, and by him, to the plaintiff. Waiver of notice of protest by guarantors, non-payment at maturity, ownership, etc., are alleged.

Upon the said note this count seeks to hold the guarantors liable, as if they were in effect joint makers thereof.

The second count, after repeating the allegations of the first substantially, alleges that the said guaranty was intended by the defendants to induce, and did induce, Witherow, and others, to whom it was offered, to take and give value for it.

The recovery, under this count, is based upon the *note and the guaranty thereon.*

The defendants filed twelve pleas, the first, second, third, fourth, eleventh and twelfth invoke the Statute of Frauds as a defense against the contract of guaranty.

The fifth, sixth, ninth and tenth raise want of consideration in one or both of the instruments—the note and the guaranty.

The seventh is a plea of set-off, and

The eighth, one of payment.

To each of these pleas, excepting No. 8, demurrers were filed, and were sustained by the Court. A replication was filed to No. 8, and the demurrer thereto was overruled. The issue joined on this plea, No. 8, was found for the plaintiff, and judgment entered accordingly. The ruling of the Court on the demurrers presents the only question submitted for consideration.

To the pleas numbered 1, 2, 3 & 4, (R. pp. 4 & 5) the plaintiffs below filed a demurrer containing seven grounds, as follows (R. p. 8 & 9):

1. Said pleas confess the allegations of the complaint, and do not set up any matters in avoidance of the liability of the defendants on the contract sued on.

2. Said pleas do not deny the allegations of the complaint or set up any matter in avoidance of the liability of the defendants growing out of the facts set up in the complaint.

3. Upon the facts set up in the complaint, which are admitted by the pleas, it is not necessary to charge the defendants that the guaranty should express any consideration therefor.

4. Upon the facts set up in the complaint, which are not denied by the pleas, it is not necessary to charge defendants that the guaranty should express any consideration therefor.

5. It is shown by the allegations of the complaint that said endorsement in writing upon the note made by the Sheffield Furnace Company, which is set out in the complaint, upon which endorsement defendants are sought to be held liable, was made by the defendants contemporaneously with the execution of said note, and before the same was negotiated, and before the same became an obligation, and for the purpose of having the same negotiated.

6. It is shown by the allegations of the complaint, and not denied by the pleas, that the said alleged guaranty was executed contemporaneously with the execution of said note set out in said complaint, and prior to its negotiation, and was a part of said note at its negotiation.

An additional demurrer of thirteen grounds was filed to all of the pleas, except the 8th, 11th and 12th. The 11th and 12th pleas were demurred to on eleven of the thirteen grounds named in the demurrer.

The 8th was not demurred to.

The grounds of the demurrer are as follows (R. pp. 9, 10):

First, That said plea is insufficient in this, that it alleges conclusions of the pleader, and not any facts upon which the plaintiff can take issue.

Second. That said plea does not show that said note and

guaranty were not founded upon a valuable consideration, moving to said guarantors prior to the execution of the same.

Third, Said plea is filed as an answer to the entire complaint filed herein, and alleges no matters or things traversing or avoiding the material allegations of the second or amended count of said complaint.

Fourth, It is not denied by said plea that said guaranty was made upon said note prior to its negotiation to this plaintiff, and to induce this plaintiff or some one else to purchase or discount the same.

Fifth, It is not denied by said plea that defendants did make and endorse said guaranty upon said note to give it credit and currency, and that it was so endorsed prior to its negotiation to plaintiff.

Sixth, That it is alleged in said complaint and not denied in said plea that plaintiff purchased said note and guaranty for value before the maturity of the same.

Seventh, That it is alleged in said complaint and not denied in said plea that said defendants endorsed said guaranty upon said note to give it credit and currency prior to its negotiation to plaintiff, and said plea does not aver or show that plaintiff had any notice of any want or consideration for such guaranty.

Eighth, Said guaranty endorsed upon said note imparts a consideration, and it is not denied that the same was endorsed thereon prior to the negotiation of the same to the plaintiff, nor is it averred that plaintiff had any notice of said alleged want of consideration for said guaranty.

Ninth, It is averred in said complaint, and not denied in said plea, that defendants endorsed said guaranty upon said note prior to its negotiation to plaintiff to give it credit and currency, and that plaintiff purchased the same for value before maturity, and it is not averred in said plea that plaintiff had any notice of the several matters and things set forth therein.

Tenth, Each plea professes to be an answer to the whole complaint, but it is not an answer or bar to the whole complaint.

Eleventh, Said plea is not verified by any oath or affidavit.

And to each of said pleas, except the two numbered eleven and twelve, respectively, said plaintiff assigns to each separately the following additional grounds of demurrer:

First, That it is not denied in said plea that defendants endorsed said guaranty upon said note contemporaneously with its execution and prior to any negotiation thereof.

Second, That it is not denied in said plea that said defendants endorsed said guaranty upon said note contemporaneously with the execution of the same to give credit and currency to the same and to induce those to whom the same was offered for negotiation or sale to purchase the same and give value therefor.

If any one of the pleas demurred to is good as against all of the grounds of the demurrers, then the action of the court in sustaining the demurrers, was erroneous, otherwise not.

Pleas numbered 1, 2, 3 and 4 (R. pp. 4, 5), attack the guaranty sued on, admitting the allegations of the complaint, as being obnoxious to the Statute of Frauds, as it exists under the laws of Alabama. This statute, so far as it is pertinent to the matters here involved, is, as follows:

"Certain contracts to be in writing, else void. In the following cases every agreement is void, unless such agreement, or some note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party to be charged therewith, or some other person by him, thereunto, lawfully authorized in writing:

1: * * * * * * *

2: * * * * * * *

3: "Every special promise to answer for the debt, default or miscarriage of another." Sec. 1732 of the Code of Alabama (1886).

These pleas assert the invalidity of the guaranty because it is a special promise to answer for the debt of another, and *fails to express the consideration.*

The demurrer (R. pp. 8 and 9) to these particular pleas,

says, in effect, that the guaranty under the facts stated does not come within the influence of the Statute of Frauds. The issue presented, is whether a guaranty executed contemporaneously with the note, the payment of which it guarantees, and before its negotiation, and for the purpose of having the same negotiated, comes within the statute.

Pleas number 11 and 12 deny the allegations of the complaint to the effect that the guaranty was executed contemporaneously with the execution of the note, or prior to its negotiation, by asserting the contrary, and invoke the Statute of Frauds, because the guaranty fails to express the consideration. (R. pp. 7 and 8.)

The demurrer (R. pp. 9 and 10.) attacks these two pleas upon eleven grounds, which will be hereafter considered *seriatem*, with reference to plea No. 12, it being admitted hereby that if plea No. 12 is not good, No. 11 is equally defective.

Plea No. 9 (R. p. 7.) denies the consideration of the note sued on, and No. 10 (R. p. 7.) asserts that the note, the payment of which the defendants guaranteed, was given to J. P. Witherow upon a past due consideration, and that the guaranty was made without any consideration. The demurrer (R. p. 9 and 10.) was also sustained to these pleas.

From our comprehension of the subject, the inquiries raised by the peadings in the cause, may be reduced to three:

1. Is the guaranty of a negotiable promissory note, made contemporaneously with the execution of the note, or before its negotiation, for the purpose of giving the same credit and currency, and based upon a valuable consideration, within the operation of the Statute of Frauds?

2. Is the guaranty of such a note found upon a valuable consideration if made at a time different from the execution of the note, and after its negotiation void under the Statute of Frauds, although it was made to give the note credit and currency?

3. Is the guaranty of a negotiable promissory note given for a past due debt open to the defense of want of consideration?

We think the first proposition is raised under the pleas 1, 2, 3 and 4; the second under pleas 11 and 12; the third under plea 10.

Each of the pleas is in short form, but comply with the requirements of the Statutes of this State on the subject of pleading, which is as follows:

"All pleadings must be as brief as is consistent with perspicuity, and the presentation of the facts, or matter, to be put in issue, in an intelligible form; no objection can be allowed for defect of form, if facts are so presented that a material issue in law or fact can be taken by the adverse party thereon." (Code 2664.)

FIRST:

The foundation of the contract of guaranty is the primary liability of another, and from its essential nature, a written guaranty is a special promise to pay the debt of another. Every special promise to pay the debt of another is void under the Statute of Frauds, as the same obtains in Alabama, unless it, or some memorandum thereof, is in writing, expressing the consideration, etc. In this case, the agreement is in writing and is signed by the parties sought to be charged, but it does not express the consideration. The first four pleas merely assert this proposition, and assail the contract sued upon as being obnoxious to it. Do the facts alleged in the complaint, and relied upon in the demurrer to the pleas, that the guaranty was signed contemporaneously with the note, or before its negotiation, and that it was made to induce, and did induce, others to take it for value, take the promise out of the Statute?

A guaranty endorsed upon a promissory note past due, to the effect that the payment of the note was guaranteed at a certain time is indisputably within the Statute.—*Rigby v. Norwood*, 34 Ala. 129. And we apprehend that it will not be denied that such promises, if made at any time before the

negotiation of the note, but after its execution, falls within the section of the Statute we are considering, unless some other fact in the transaction prevents the operation of the Statute. The contention presented by the demurrer, is that, being executed contemporaneously with the note, and made for the purpose of giving the latter credit and currency, and having that effect, the guaranty was an *original* and not a *collateral* promise. The time when the guaranty was executed, whether before or at the time of the negotiation of the note, does not change its character, or legal effect. If the direct and leading object of the guaranty was to pay the debt for which another was liable, it comes within the Statute, whether made before, after or at the same time with the original promise.

Nelson vs. Boynton, 3 Met. 396;
Am. Law Reg. (N. S) Vol. xvi (note on page 474).

The pleas, by not denying, admit the allegation that the guaranty was made for the purpose of giving the note currency, and inducing others, to whom it might be offered, to give value for it, and the demurrer assails them as being fatally defective for that reason. Why should a guaranty be any the less a guaranty because the purpose of its execution was to give currency to another promise, and to induce favorable consideration of it by those wishing to deal with it? Is not that the purpose of all guaranties? Is not that their effect? We can't conceive how guaranties could ever be made for any different or other purpose, and that they could have any different effect, if they had any at all. Would not such purpose and such effect, if material or relevant at all, be mere facts or circumstances to go to the jury in aiding their determination of the question of whether the purpose of the guarantors was to pay another debt or obtain a benefit for themselves? By sustaining the demurrer the Court below held that, as a matter of law, these facts took the promise out of the Statute.

It is true that these pleas do not deny the averment of each count of the Complaint, that the guaranty was made

by the defendants for a valuable consideration. They were filed upon the theory that the guaranty, being the special promise to pay the debt of another, made contemporaneously with the original promise, it is void, under the Statute, because it fails to express the consideration, although, there may have been one. There are decisions that hold that a promise to pay the debt of another, based upon a valuable consideration moving to the promissor, is not within the Statute, (71 Ala. 555; 30 Ala. 599,) but, the averment here "was guaranteed for a valuable consideration" is not tantamount to an averment that the consideration was valuable and was beneficial to the guarantors, and did not call for denial by the plea invoking the Statute of Frauds for a defense. Under the familiar rule of Construction of Pleadings "that the averments are to be taken most strongly against the pleader," the averments of the Complaint in this respect, under this rule, would be held to be to the effect that the consideration was beneficial to another than the promissor.

The other grounds of demurrer common to all the pleas will be noticed under the subsequent divisions of this argument.

SECOND.

Pleas 11 & 12 (R. pp. 7 & 8) deny that the guaranty sued upon was made before the negotiation of, or contemporaneous with the execution of, the note in question, and present the Statute of Frauds as a defense because the consideration is not expressed in the promise.

We will consider the demurrer with reference to plea No. 12. The demurrer contains eleven grounds. Some of them are clearly without pertinence, as the plea on its face contains the matters, affirmatively, that are alleged not to be in the plea, and directly deny matters alleged in the Complaint, that the demurrer says it does not deny. We shall not notice these.

1. This plea (No. 12, R. 8) contains no conclusions, unless they be conclusions of law. The time when the guaranty was made is clearly a matter of fact, as is the

other averment that it does not express the consideration. One is provable by evidence *aliunde;* the other by reference to the terms of the guaranty itself. That the guaranty is a special promise to answer, etc., is no more a conclusion, than to say a promissory note is a promise to pay. *Special*, in this Statute, means *actual*, *express*, and the promise is sued upon as the guaranty of the note of another. Under the Statute of Alabama, which is as follows:

"No demurrer in pleading can be allowed but to matter of substance which the party demurring specified; and no objection can be taken or allowed which is not distinctly stated in the demurrer." Code of 1886, Sec. 2690. This ground of demurrer would be general. But the plea is not, in any event, open to the objection urged.

2. The second ground of this demurrer (p. 9 of Record) attacks each of the pleas, for the reason that they fail "to deny or show that the said note and guaranty were not founded upon a valuable consideration, moving to said guarantors, prior to the execution of the same." Is this good pleading? Certainly a plea, setting up the Statute of Frauds against a contract shown by the complaint to be within its influence, need not negative the consideration. If the complaint, by clear averments, showed a contract not obnoxious to the Statute,—one clearly without its operation,—then a plea, setting up the Statute, would be defective, unless it negatived the existence of all facts taking the contract out of the Statute. In this case, the complaint alleges that the cause of action is the guaranty of the debt of another. In such case, there is but one fact that will prevent the application of the Statute of Frauds, and that is, that for a valuable consideration moving to them, the defendants guaranteed the debt. With that averment only, the general issue would have been necessary to raise the question. But, without it, the plea of the Statute of Frauds is a complete answer, and to have availed itself of the fact, which was not averred, the plaintiff would have had to reply that such a consideration underlay the guaranty. The answer to this ground of the demurrer is, the plea does not have to show

that a contract, *prima facie* within the Statute of Frauds, is without valuable consideration moving to the promissors. When the complaint avers this fact, then a plea must deny it in order to raise the issue, but, if it is not averred, with respect to a guaranty, then, a denial is unnecessary, because, if the guaranty is subject to the Statute, it is immaterial whether it was upon valuable consideration, or not. The only question in such case being, does the contract comply with the requirements of the statute.

3–10. The third and tenth grounds of the demurrer (R. p. 9 and 10) assail the pleas to which they are directed as being defective, in that, while they purport to be in answer to the whole of the complaint, they answer only a part of it.

It is a familiar rule of pleading, that a plea is bad which purports to answer the whole of the complaint, but answers only a part of it. But, this objection cannot obtain as against these pleas. The cause of action upon which the guarantors are liable is the guaranty. The first count in the complaint is upon the note, and the second upon the note and guaranty. Yet, the prime and moving cause against the defendants, is the guaranty. An unconditional and absolute promise to pay the debt of another at maturity, if valid as to consideration and Statute of Frauds, is an independent promise that will support an action, and such promise will make the promissor liable on the original or independent promise. Yet, when the action is based upon the independent promise, it is the establishment of the guaranty that entitles the plaintiff to his verdict. Any sufficient legal defense that will defeat the guaranty, will defeat the action on the original promise, as against the guarantors. Here, the defendants meet each phase of the case by defending against the guaranty. Their liability in the first count is charged as growing out of their guaranty,—the same is charged in the second. If any of the pleas go, sufficiently, to the guaranty, it goes to the whole complaint.

4. We have discussed the objection urged in the fourth ground under subdivision 1, of this argument, so far as it

applies to the 1st, 2d, 3d and 4th pleas. The 11th and 12th pleas contain a denial of the allegation as to when the guaranty was made. We have already endeavored to show that the purpose of the guarantors in making the guaranty,—viz: To give the note credit and currency, and the effect of the guaranty on other persons, viz: influencing them to pay value for the note, cannot operate to change the legal effect or character of the contract or guaranty. It is a contract of guaranty by its terms, and nothing more, whether it was made with or without the motives charged, and, whether, or no, it had the effect charged. It is equally a guaranty whether it expresses the consideration, or no. But, if it is a guaranty of anothers debt, and fails to express the consideration in the writing, then it is void under the Alabama Statute, as much so as if it had not been reduced to writing.

Bolling vs. Manchus, 65 Ala. 558.

5. This ground is substantially a repetition of the 4th ground.

6, 7. The mere fact that the plaintiff below purchased the note and guaranty for value before the maturity of the same, cannot operate to cure the defect existing in the guaranty, and apparent on its face, viz: the failure to express the consideration. Nor, can the fact that the plaintiff had no notice of the want of consideration for such guaranty, change the rule of measuring the contract under Statute of Frauds. The effect and operation of the statute, and its very purpose, would be defeated, if it be evaded or avoided by these facts. The guaranty is an independent written contract. It purports to be an undertaking in respect to anothers debt. The consideration is not named. All in dealing with that contract are informed that it is wholly void for that reason, if it is a collateral promise, and it is of its very nature, in its inception, a collateral promise, and can be an original promise only in the event of a valuable consideration having been paid to the guarantors. The purchaser of this guaranty cannot shut his eyes to what is shown by the contract, *ex vi termini*, and say, when faced with the proposition that the guaranty expresses no consid-

eration, that he had no notice that there was not in fact a valuable consideration paid to the guarantors which would have (probably according to the decisions of some of the States) made the promise an original one.

8. The 8th ground invokes the rule created by the Statutes of Alabama in reference to proof of consideration of instruments sued on.—*Code of Alabama (1886), Sec. 2769*, which is as follows:

Every written contract the foundation of the suit, purporting to be executed by the party sought to be charged, his partner, agent, or attorney in fact, is evidence of the existence of the debt, or that the party undertook to perform the duty for which it was given, and that it was made on sufficient consideration; but may be impeached by plea, and, when so impeached, the burden of proof is on the defendant."

Whether this statute applies to contracts within the influence of the Statute of Frauds, was directly considered in *Rigby vs. Norwood*, 34 Ala. 129, and there held that it did not. It would work a practical abrogation of the Statute of Frauds, says the Court.

9, 10. These grounds involve only propositions already discussed, as do grounds first and second to all the pleas except 11 and 12 (R. p. 10).

11. There is nothing in the 11th ground. Only pleas in abatement, pleas which deny the execution by the defendant, his agent, attorney, or partner, of any instrument in writing, the foundation of the suit, or the assignment of the same, pleas to lost or destroyed instruments, and pleas *puis darein* continuance, need be verified.—Code of Ala. (1886), Sec. 2676.

THIRD.

Plea No. 10 (R. p. 7) asserts that the note guaranteed by defendants was based upon a past due consideration owing J. P. Witherow, and not upon a present consideration paid or liability incurred, and that the guarantee was made without any consideration therefor.

This plea is also intended to present the Statute of Frauds as a defense to the action, and urges it from another standpoint than that of the other pleas. Its purpose is to charge that the note, the payment of which was guaranteed, was based upon a past due, and not a presently accruing liability, and that the guaranty was made without any consideration whatever. Measured in the light of the averments of the complaint, which are not negatived by the plea, and in connection with the averments of the plea, we will see that, the guaranty was executed contemporaneously with the execution of a note given for a past due consideration, and that the guaranty is without any consideration. It is a principle of law, in some jurisdiction, as hereinbefore alluded to, that a promise to pay the debt of another past due, or already created, is not within the statute of frauds, if the promise was based upon a valuable consideration moving to the promissors.—71 Ala. 555; 30 Ala 599. This plea asserts that the debt guaranteed, although guaranteed at the time the note was given, was past due, or previously created, and that there was no consideration, valuable or otherwise, to support it. If this is true, the promise contained in the guaranty is illegal and void, notwithstanding the ownership of the plaintiff was acquired without notice and for value, and that the gurranty was made to give the note currency. If it was alleged in the complaint that the guarantors, in executing their guaranty, were induced to do so by a valuable consideration moving to them, it could not be claimed that the statute intervened and made the promise void under the Statute of Frauds. And, if the plea denied the consideration moving to the guarantors, and alleges facts sufficient to show that the promise was for the debt of another, then the issue is sufficiently presented that a jury may find and determine it.

We have been led into a minute and detailed discussion of the sufficiency of the pleas by the question presented by the record. The questions of pleading—that is all that is involved—are determinable by settled and elementary prin-

ciples of law,--hence we are unable to cite authorities bearing on the points. The court below, by its rulings, decided that no material issue was presented by any of the pleas, that was an answer to the complaint. It is so apparent to us that this was erroneous, and opposed to elementary principles of law, that we are at a loss to find authorities directly in point, and we submit the question upon the general argument, which, we think, is founded upon reason and logic.

Respectfully submitted,

JOHN D. ROQUEMORE,
J. N. ARRINGTON.

149 U 529 f

RECORD, CASE No. 13,751.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 166.

H. C. MOSES, M. L. MOSES, ALFRED H. MOSES, O. O. NELSON, AND J. R. ADAMS, PLAINTIFFS IN ERROR,

vs.

THE NATIONAL BANK OF LAWRENCE COUNTY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

FILED OCTOBER 12, 1889.

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1 At a term of the circuit court of the United States for the middle district of Alabama begun and held at Montgomery, Alabama, on the 1st Monday in November, it being the fifth day of said month, in the year of our Lord one thousand eight hundred and eighty-eight.

Present: The Honorable John Bruce, one of the judges of said court, presiding.

* * * * * * *

December 1st, 1888, a day of the regular term of said court, the Honorable John Bruce present and presiding, the following proceedings were had, as follows, to wit:

Summons & Complaint.

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Middle District of Alabama, May Term, 1888.

THE NATIONAL BANK OF LAWRENCE COUNTY
vs.
M. L. MOSES *et al.* } 662.

The plaintiffs, The National Bank — Lawrence County, who is a corporation duly organized and existing under the laws of Congress of the United States and is a national banking corporation, residing and doing business at New Castle, in the State of Pennsylvania, and a citizen of Pennsylvania, claims of the defendant-, M. L. Moses, O. O. Nelson, H. C. Moses, J. R. Adams, S. Wolff, and Alfred H.

2 Moses, who are resident citizens of the State of Alabama, and all of whom reside in the middle district of Alabama, the sum of twelve thousand one hundred and eleven $\frac{51}{100}$ dollars due on a promis-ory note executed and made on August 15th, 1887, by the Sheffield Furnace Company, a corporation under the laws of Alabama, for twelve thousand one hundred and eleven $\frac{51}{100}$ dollars, payable to the order of said last-mentioned corporation at the banking-house of Moses Brothers, Montgomery, Alabama, four months after the date of said note, the payment of which said note at its maturity was guaranteed for a valuable consideration by defendants. The said guaranty of said note by said defendants was made before the maturity & before the negotiation of said note, and compare favorably with its execution, and was and is absolute and unconditional, was end'sed on the back of said note, and in the following words, "We hereby guarantee the payment of the note at maturity," and was signed by all of said defendants, and the said note was not paid at its maturity, of which defendants had due notice; and plaintiff avers that before the maturity of said note the defendants duly waived protest & notice and signed such waiver on the back of said note. The said note before its maturity was duly en-orsed to the order of J. P. Witherow and by said J. P. Witherow

to the plaintiff. Said note, with interest thereon, as well as said guaranty, is still due & unpaid, and is the property of plaintiff.

RICE & WILEY,
Att'ys for Pl'ff.

3 UNITED STATES OF AMERICA:

Circuit Court of the United States for the Middle District of Alabama.

The President of the United States of America to the marshal of said district, Greeting:

You are hereby commanded to summon M. L. Moses, O. O. Nelson, H. C. Moses, J. R. Adams, S. Wolff, and Alfred H. Moses, who are citizens of the State of Alabama and of the middle district of said State, to appear before the hon. circuit court aforesaid, at the place of holding said court, at Montgomery, on the 1st Monday of May next, to answer the complaint of the National Bank of Lawrence county, a corporation under the laws of the Congress of the United States as a banking corporation, who resides and does business at New Castle & is a citizen of the State of Pennsylvania.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 16th day of April, in the [SEAL.] year of our Lord one thousand eight hundred and eighty-eight.

Attest: J. W. DIMMICK,
Clerk U. S. Circuit Court, Middle District of Alabama.

We hereby accept service of the within summons and complaint, and consent that the case described therein may be entered on the docket of the within-mentioned circuit court of the United
4 States at the next or any subsequent term thereof, and may stand for trial in that court as if summons & complaint had been duly executed by the proper United States marshal on each of us on this the 16th day of April, 1888.

H. C. MOSES.
M. L. MOSES.
O. O. NELSON.
ALFRED H. MOSES.
J. R. ADAMS.

Issued this 12th day of April, 1888. Returned & filed this 10th day of August, 1888.

J. W. DIMMICK, *Clerk.*

Demurrer of Def'ts.

In the Circuit Court of the United States for the Middle District of Alabama, November Term, 1888.

THE NATIONAL BANK OF LAWRENCE COUNTY
vs.
M. L. MOSES *et al.* } 662.

The said defendants, by their attorneys, say that the complaint of plaintiffs in this case is not sufficient in law and demur thereto and assign the following as the grounds of their demurrer, to wit:

First. It is not shown by said complaint that the said defendants have ever executed the promissory note sued on in this case.

Second. It is shown by said complaint that the Sheffield Furnace Company and not the defendants executed the promis-ory note sued on in this case.

5 Third. It is not shown in said complaint that the defendants ever executed the said note either as principals or as sureties.

Fourth. It is shown by said complaint that the defendants are guarantors and not makers of the said note sued on.

Fifth. It is shown by said complaint that the defendants guaranteed the payment of said note at its maturity and were not makers thereof, and they are not sued on their said guarantee.

Sixth. The said complaint does not show any cause of action against the defendants.

Seventh. The said complaint shows that the defendants are not liable to be sued on said note either as makers thereof or as sureties thereof, and these things the defendants are ready to verify.

Wherefore, for want of sufficient complaint in this behalf, the defendants pray judgmeat, and that the plaintiff may be bar-ed from maintaining its aforesaid action, &c.

ARRINGTON & GRAHAM,
Att'ys for Def'ts.

Filed in office this 9th day of November, 1888.
J. W. DIMMICK, *Clerk.*

Amendment.

THE NATIONAL BANK OF LAWRENCE COUNTY
vs.
M. L. MOSES *et al.* } 662.

The plaintiff, the said The National Bank of Lawrence County, which is a corporation duly organized and existing under
6 the laws of the Congress of the United States & is a national banking corporation as aforesaid, residing and doing business at New Castle, in the State of Pennsylvania, and a citizen of Pennsylvania as aforesaid, claims of the said defendants the other and

further sum of twelve thousand one hundred and eleven $\frac{51}{100}$ dollars due on the promis-ory note and the guaranty appearing on the back of said note, which note and guaranty mentioned in this court are hereinafter described. The said note mentioned in this court was made and executed on the 15th day of August, 1887, by the Sheffield Furnace Company, then & still a corporation under the laws of Alabama, for twelve thousand one hundred and eleven $\frac{51}{100}$ dollars, payable to the order of said last-mentioned corporation four months after the date of said last-mentioned note at banking-house of Moses Brothers, Montgomery. The payment at its maturity of the said last-mentioned note before its delivery or negotiation and contemporaneously with its execution and in order to give it credit and currency was guaranteed by said defendants for a valuable consideration by an endorsement in writing on the back of said note, which was made and signed by each and all of said defendants, and which last-mentioned guaranty was in the following words, "We hereby guarantee the payment of this note at maturity," and
7 was intended by said defendants to induce and did induce James P. Witherow and all others to whom said note and guarantee were offered for negotiation or sale to take said note and guaranty and to give value therefor.

Plaintiff avers that the said note, with the said guaranty thereon, was before its maturity duly endorsed for value by the said Sheffield Furnace Company to the order of the said Witherow, by the name and description of J. P. Witherow; and plaintiff avers that afterwards & before the maturity of said note and guaranty thereon the said Witherow duly endorsed said note, guaranteed as aforesaid, to the plaintiff for value. Plaintiff avers that afterwards and before the maturity of said note and guaranty, which guaranty was endorsed on said note as aforesaid, the defendants in writing endorsed on said note their waiver of protest and notice in relation thereto, and the said note, guaranteed as aforesaid, was not paid at its maturity, and that said note and guaranty, with interest thereon, still remain- unpaid and *are* the property of the plaintiff.

RICE & WILEY,
Pl'ff's Att'ys.

Filed in office Nov. 20th, 1888.

J. W. DIMMICK, *Clerk.*

Pleas # 1, 2, 3, & 4.

In the Circuit Court of the United States for the Middle District of Alabama, November Term, 1888.

THE NATIONAL BANK OF LAWRENCE COUNTY
vs.
M. L. MOSES *et al.* } 662.

8 The said defendants, by their attorneys, for answer to the plaintiff's complaint, say—

First. The defendants, for answer to so much of plaintiff's com-

plaint as sues upon a guarantee, say that said guarantee does not express any consideration therefor.

Second. And the defendants, for further answer to the plaintiff's complaint, say that the guarantee sued on is a special promise to the answer for the debt, default, or miscarriage of another, and does not express any consideration therefor.

Third. And the defendants, for further answer to the plaintiff's complaint, say that the guarantee sued on is void under the statutory laws of Alabama, because it does not express any consideration therefor.

Fourth. The defendants, for further answer to the plaintiff's complaint, say that the guarantee sued on is a special promise to answer for the debt of another, and does not express any consideration therefor; and this defendant *is* ready to verify. Wherefore *he* prays judgment if the plaintiff ought to have *his* aforesaid action against *him*, etc.

ARRINGTON & GRAHAM,
Att'ys for Def'ts.

Filed in office Dec'r 1st, 1888.

J. W. DIMMICK, *Clerk.*

Plea No. 5.

In the Circuit Court of the United States for the Middle District of Alabama, Nov. Term, 1888.

THE NATIONAL BANK
vs.
M. L. MOSES *et al.* } 662

9 The said defendants, by their attorneys, for further answer to the plaintiff's complaint, say that the note for the payment of which the defendants guaranteed was given by the Sheffield Furnace Company for a debt due to J. P. Witherow prior to the making said note. The note was not founded upon a consideration paid or liability incurred at the time of the making thereof, and the guaranty sued on was made without any consideration therefor.

ARRINGTON & GRAHAM,
Att'ys for Defendants.

Filed Dec. 1st, 1888.

J. W. DIMMICK, *Clerk.*

Plea No. 6.

In the Circuit Court of the United States for the Middle District of Alabama, November Term, 1888.

THE NATIONAL BANK OF LAWRENCE COUNTY
vs.
M. L. MOSES *et al.* } 662.

The defendants, by their att'ys, for further answer to the plaintiff's complaint, say that the instrument sued upon was made

without any good or valuable consideration; and this the defendants are ready to verify. Wherefore they pray judgment if the plaintiff ought to have *his* aforesaid action against them.

ARRINGTON & GRAHAM,
Def'ts' Att'ys.

Filed Dec. 1st, 1888.

J. W. DIMMICK, *Clerk.*

10 *Plea No.* 7.

In the Circuit Court of the United States for the Middle District of Alabama, November Term, 1888.

THE NATIONAL BANK OF LAWRENCE COUNTY
vs.
M. L. MOSES. } 662.

The defendants, as a defense to the action of the plaintiff, saith that at the time *of* said action was commenced the said J. P. Witherow was indebted to the Sheffield Furnace — in the sum of twenty-five thousand dollars on an unliquidated demand, which they hereby offer to set off against the demand of the plaintiff.

ARRINGTON & GRAHAM,
Att'ys for Def'ts.

Filed Dec'r 1st, 1888.

J. W. DIMMICK, *Clerk.*

Plea No. 8.

In the Circuit Court of the United States for the Middle District of Alabama, November Term, 1888.

THE NATIONAL BANK OF LAWRENCE COUNTY
vs.
M. L. MOSES *et al.* } 662.

The defendants, for answer to the complainants, saith the Sheffield Furnace Company paid to J. P. Witherow the debt for the recovery of which this suit was brought before this action was commenced.

ARRINGTON & GRAHAM,
Att'ys for Def'ts.

Filed Dec'r 1st, 1888.

J. W. DIMMICK, *Clerk.*

11 *Plea No.* 9.

In the Circuit Court of the United States for the Middle District of Alabama, November Term, 1888.

THE NATIONAL BANK OF LAWRENCE COUNTY
vs.
M. L. MOSES. } 662.

The defendant, for answer to complain't, says that the note described in the complaint was made without any consideration whatever.

ARRINGTON & GRAHAM,
Att'ys for Def'ts.

Filed Dec'r 1st, 1888.

J. W. DIMMICK, *Clerk.*

Plea No. 10.

In the Circuit Court of the United States for the Middle District of Alabama, November Term, 1888.

THE NATIONAL BANK OF LAWRENCE COUNTY
vs.
M. L. MOSES *et al.* } 662.

The said defendants, by their attorneys, for further answer to the plaintiff's complaint, say—

That the note for the payment of which defendants guaranteed was given by the Sheffield Furnace Company for a debt owing to J. P. Witherow prior to the making thereof and was not founded upon a consideration paid as liability *occurred* at the time of the making thereof and the guarantee sued on was made without any consideration thereof.

ARRINGTON & GRAHAM,
Att'ys for Def't-.

Filed Dec'r 1st, 1888.

J. W. DIMMICK, *Clerk.*

12 *Plea No.* 11.

In the Circuit Court of the United States for the Middle District of Alabama, November Term, 1888.

THE NATIONAL BANK OF LAWRENCE COUNTY
vs.
M. L. MOSES *et al.* } 662.

The defendants, for further answer to the complaint, say—

That the guarantee sued on is a special promise to answer for the debt of another and does not express any consideration therefor and

was not executed contemporaneously with the note the pay- of which it guarantees.

ARRINGTON & GRAHAM,
Att'y- for Def't-.

Filed Dec'r 1st, 1888.

J. W. DIMMICK, *Clerk.*

Plea No. 12.

In the Circuit Court of the United States for the Middle District of Alabama, Nov. Term, 1888.

THE NATIONAL BANK OF LAWRENCE COUNTY
vs.
M. L. MOSES *et als.* } 662.

The defendants, for further answer to the complaint, say—

That the guarantee sued on is a special promise to answer for the debt of another and does not express any consideration therefor and was not executed contemporaneously with the note nor prior to its negotiation, the payment of which it guaranteed of said note.

ARRINGTON & GRAHAM,
Att'ys for Def'ts.

Filed Dec'r 1st, 1888.

J. W. DIMMICK, *Clerk.*

13 *Demurrer to Def'ts' Pleas.*

In the Circuit Court of the United States for the Middle District of Alabama.

THE NATIONAL BANK OF LAWRENCE COUNTY
vs.
M. L. MOSES *et al.* } 662.

Now comes the plaintiff and demurs to the pl-as filed in this cause & numbered first, second, third, fourth, and as grounds of demurrer assigns separately to each plea the following grounds:

First. Said pleas *confers* the allegations of the complaint and do not set up any matter in avoidance of the liability of the defendants on the contract sued on.

Second. Said pleas do not deny the allegation- of the complaint or set up any matter in avoidance of the liability of defendants growing out of the facts set up in said complaint.

Third. Upon the facts set up in the complaint, which are admitted by the pleas, it is not necessary to charge defendants that the guaranty should express any consideration therefor.

Fourth. Upon the facts set up in the complaint, which are not denied by the pleas, it is not necessary to charge defendants that the guaranty should express any consideration therefor.

Fifth. It is shown by the allegations of the complaint that said endorsement in writing upon the note made by the Sheffield Fur-